

REMARKS

The Examiner has rejected claims 1-2, 7-8, 18-19, and 24-25 under 35 U.S.C. § 102(b) as anticipated by or in the alternative under 35 U.S.C. § 103(a) over Finberg U.S. Patent 3,067,068.

Applicants have amended claim 1 to recite a feature of the invention that is neither taught nor suggested by the prior art, namely:

" . . . a carrier consisting of an edible cellulosic plant material being 100% cabbage leaves prepared by one of forming into strands or in granular form dried to a moisture content of at or below 8% by weight, said cabbage leaves having at least 30% intact cell walls; . . . "

Applicants have amended claim 18, the other independent claim to recite features of the invention that are neither taught nor suggested by the prior art, namely:

" . . . an edible cellulosic plant material being 100% cabbage leaves chopped or ground into a granular form and sized to pass a 16 mesh screen and be retained on a 30 mesh screen of a US Standard Sieve Series of screens dried to a moisture content at or below 8% by weight said granular cabbage leaves having at least 30% intact cell walls; . . . " .

It is respectfully submitted that the rejection set forth by the Examiner is not well taken in view of the foregoing amendments and the following discussions.

Applicants invention resides in the use of a cabbage leaf product that can produce either a flavor delivery system or a tobacco substitute using dried and chopped/ground cabbage leaves, providing if in granular form, they are sized in accordance with the teaching of the invention.

Furthermore, applicants invention requires that the dried and sized cabbage leaves have at least 30% intact cell walls so that the cells can adsorb added liquid water and soluble flavors.

Finberg teaches that the compositions must use papaya leaves and that only a satisfactory chewing tobacco/snuff replacement is achieved when using at least 28% by weight papaya leaves in his composition. It is true Finberg mentions cabbage as one of many plant materials that can be used to dilute the papaya leaves, but Finberg teaches that cabbage alone will not produce a satisfactory product and must be used only as a minor portion of a dominant papaya leaf product.

Furthermore, Finberg teaches flavoring of cabbage leaves prior to grinding/shredding. This method will not produce a product of sufficient quality to comprise 100% of the plant material in accord with his claims. Furthermore, Finberg teaches a cabbage alone treated in the manner he sets forth and used as a tobacco substitute is not satisfactory, but is only satisfactory as a papaya diluent. Contrast this with applicants invention, which teaches the use of 100% cabbage leaves with grinding before flavoring is preferred and that at least 30% intact cell walls must remain after grinding or sizing of the cabbage leaves. The grinding before flavoring makes flavor penetration easier by fracturing some cells and thinning the cell walls on the intact cells. Furthermore, to have a slow flavor release, more like tobacco, applicants teach that at least 30% of the intact cell walls must be present in the cabbage to adsorb the flavoring. With applicants invention, it is possible to eliminate the papaya leaves required in the Finberg reference.

Contrary to the Examiner's allegations Finberg does not teach drying the initial product to a moisture content of 8%, rather Finberg is concerned with the final moisture content which may rise to at least about 14% by weight. Finberg does not specifically teach the form in which the papaya leaves must be used and that, if they were in granular form, they must be of a specific size range.

Contrary to the allegations by the Examiner, since Finberg does not specify size or size reduction or teach or suggest what methods are used and what the result is, there can be no interpretation of conditions, without using applicants own teaching, as to how much intact cell walls would be left in the papaya leaves.

It is respectfully submitted that the Examiner has used applicants own teaching to not only select but to interpret the prior art. Clearly this is contrary to existing Patent Law.

In view of the foregoing it is respectfully submitted that since Finberg neither teaches nor suggests applicants invention as set forth in the amended claims the rejection of claims 1-2, 7-8 18-19 and 24-25 under 35 U.S.C. § 102(b) or under 35 U.S.C. § 103(a) over Finberg is not well taken and should be withdrawn.

The Examiner has rejected claims 3-6 and 20-23 over Finberg in view of Garber U.S. Patent 2,331,830. It is respectfully submitted that in view of the foregoing arguments the primary reference to Finberg is fatally defective. The mere fact that Garber teaches that chewing tobacco can be supplied in granular form without specifying particle ranges or sizes, would not fill in deficiencies of the primary reference. Here again, the Examiner is using applicants own teaching to not only select but to interpret the reference.

In view of the foregoing it is respectfully submitted that the rejection of claims 3-6 and 20-23 under 35 U.S.C. § 103(a) is not well taken and should be withdrawn.

The Examiner has rejected claims 9 and 26 under 35 U.S.C. § 103(a) over Finberg et al. in view of Nonomura et al. U.S. Patent 5,597,400 and Payne U.S. Patent 4,946,697. It is respectfully submitted that the Examiner is now combining four references to render as obvious claims which are drawn to a specific cabbage material identified by applicants as particularly preferred for their invention. Neither of the secondary or tertiary references teaches freeze dried cabbage classified as Brassica oleracea. In point of fact neither Nonomura et al. or Payne have either the remotest relationship to a flavor delivery system or a tobacco substitute using cabbage material, as specified by applicants.

Here again, the Examiner has used applicants own teaching to not only select but to interpret the references and has reached beyond the field of the invention to capture what it is believed to be relevant prior art without a nexus between the primary and the secondary references.

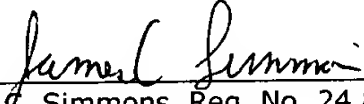
In view of the foregoing arguments it is respectfully submitted that the rejection of claims 9 and 26 under 35 U.S.C. § 103(a) is not well taken and should be withdrawn.

It is respectfully submitted that the Finberg Patent was available at least as early as 1962, the Garber Patent at least as early as October 12, 1943, the Payne Reference at least as early 1990 and the Nonomura Reference as least as early as 1997. Surely in view of the desire to find tobacco substitutes if the teachings were as suggested by the Examiner, applicants invention would have been taught or suggested prior to applicants filing. Clearly this not the case.

Applicants can not too strongly suggest the Examiner has fallen into the trap of using their teaching to not only select but to interpret the prior art.

In view of the foregoing amendments and arguments it is respectfully submitted that the above-identified application is in condition for allowance and a notice to that effect is earnestly solicited.

Respectfully Submitted,

  
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Enclosures:

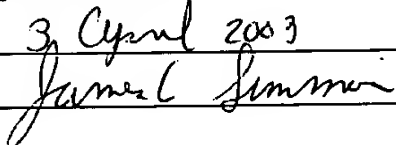
Version with markings to show changes made

Dated: April 3, 2003

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3, April 2003

VERSION WITH MARKINGS TO SHOW CHANGES MADECLAIMS:

1                   1.       (Amended) A chewable flavor delivery system comprising in  
2 combination:

3                   a carrier consisting of an edible cellulosic plant material being 100%  
4 cabbage leaves prepared by one of, forming into strands or in grannular form dried  
5 to a moisture content of at or below 8% by weight[;], said [plant material] cabbage  
6 leaves having at least 30% intact cell walls;

7                   a water soluble but not water containing flavoring ingredient in liquid  
8 form and capable of entering intact [said] cell walls of said cabbage leaves [plant  
9 material]; and

10                  an effective amount of a food safe humectant.

1                   4.       (Amended) A delivery system according to claim 1 [3], wherein  
2 said grannular cabbage leaves are [cellulosic material is] sized to pass a 16 mesh  
3 and be retained on a 30 mesh screen of a U.S. Standard Sieve Series of screens.

1                   5.       (Amended) A delivery system according to claim 4, wherein  
2 said grannular cabbage leaves are [cellulosic material is] sized to pass a 16 mesh  
3 screen and be retained on a 20 mesh screen.

1                   6.       (Amended) A delivery system according to claim 4, wherein  
2 said grannular cabbage leaves are [cellulosic material is] sized to pass a 20 mesh  
3 screen and be retained on a 30 mesh screen.

1                   9.       (Amended) A delivery system according to claim 1, wherein  
2 said cabbage leaves are [cellulosic plant material is] freeze dried green cabbage  
3 classified as Brassica oleracea capitata.

1                   18.      (Amended) An oral tobacco substitute comprising in  
2 combination:

3                   an edible cellulose plant material being 100% cabbage leaves chopped  
4 or ground into a grannular form and sized to pass a 16 mesh screen and be retained  
5 on a 30 mesh screen of a U.S. Standard Sieve Series of screens dried to a moisture  
6 content at or below 8% by weight, said grannular cabbage leaves [plant material]  
7 having at least 30% intact cell walls;

8                   a water soluble but not water containing flavoring ingredient in liquid  
9 form and capable of entering [said] intact cell walls of said grannular cabbage leaves  
10 [plant material]; and

11                   an effective amount of a food safe humectant.

1                   22.    (Amended) A tobacco substitute according to claim 18 21,  
2 wherein said grannular cabbage [cellulosic material] is sized to pass a 16 mesh  
3 screen and be retained in a 20 mesh screen.

1                   23.    (Amended) A tobacco substitute according to claim 21, wherein  
2 said grannular cabbage [cellulosic material] is sized to pass a 20 mesh screen and be  
3 retained on a 30 mesh screen.

1                   26.    (Amended) A tobacco substitute according to claim 18, wherein  
2 said cabbage leaves are [cellulosic plant material is] freeze dried green cabbage  
3 classified as Brassica oleracea capitata.